

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

AMALGAMATED TRANSIT UNION,
LOCAL 1548

Petitioner

and

TRANSIT CONNECTION, INC.

Employer

Case No. 01-RC-145728

EMPLOYER’S BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER’S
REPORT AND RECOMMENDATION ON OBJECTION

The Employer, Transit Connection, Inc., pursuant Section 102.69 of the Rules and Regulations of the National Labor Relations Board (“Board”), hereby respectfully submits the following brief in support of its Exceptions to the Hearing Officer’s Report and Recommendation on Objections (“Report”) issued on June 3, 2015.

I. STATEMENT OF THE CASE

This matter is before the Board as a result of an election conducted on March 18, 2015 among the employees of the Employer the unit consisting of “All full-time and regular part-time operators employed by the Employer at its 11 A Street, Edgartown, Massachusetts facility but, excluding office clerical employees, managerial employees, dispatchers, mechanics, confidential employees, seasonal employees, guards and supervisors as defined in the Act, and all other employees.” [*Employer Hearing Exhibit 2.*]¹ On March 18, 2015, the Board conducted an election at the Employer’s facility in Edgartown. The Tally

¹ Citations to *Employer Hearing Exhibits* hereinafter referred to as “*E. Ex.*”

of Ballots reveals that 18 voters cast ballots for representation by Petitioner and 21 voters cast ballots against representation. [*Board Hearing Exhibit 1a.*]²

By letter dated March 23, 2015, the Petitioner filed a single Objection to the results of the election, claiming that the Employer engaged in objectionable conduct by providing a list of eligible employees that allegedly contained incorrect and/or incomplete addresses for several eligible employees. Thereafter, on or about April 28, 2015, the Regional Director issued a Notice of Hearing on Objection to Election, which ordered that a hearing be conducted on the Petitioner's Objection. The hearing was held on May 7, 2015 before Hearing Officer Gene Switzer at the offices of Region 1 of the Board in Boston, Massachusetts.

On June 3, 2015, the Hearing Officer issued his Report and Recommendation on Objection, recommending that the Petitioner's Objection be sustained and that the results of the March 18th election be set aside.

II. ARGUMENTS IN SUPPORT OF EMPLOYER'S EXCEPTIONS

1. The Hearing Officer Erred by Finding that the Union was Unable to Communicate With 15 out of the 39 Employees on the Voter Eligibility List, Where the Employer Provided a Complete and Accurate List of Each Employee's Home Address.

The eligibility list at issue in this matter was compiled by the Employer based upon accurate records maintained by the Employer reflecting information specifically provided by the employees and fully satisfied the Employer's obligation to provide information which would allow the Union to communicate with the employees. The Employer's General Manager testified credibly that employees are required to maintain a current driver's license as a condition of employment and that the addresses on the eligibility list were taken directly from those driver's licenses as well as employment applications, which in nearly every case listed a

² Citations to *Board Hearing Exhibits* hereinafter referred to as "*Bd. Ex.*"

residential or street address. [*Hearing Transcript* 34, 36.]³ Thus, the eligibility list provided the Union with actual home addresses for each employee in a correct and consistent manner so as to optimize communication with employees.

The Hearing Officer's conclusion that, "based on the inaccurate and/or incomplete addresses information that the Employer provided, the Union was *unable to communicate* with 15 out of 39, or about 38.5%, of the employees on the voter eligibility list,"⁴ (emphasis added) is simply incorrect. [*Report*, 7.] Martha's Vineyard is well-known for the complexity and vagaries of its mail delivery system as discussed in more detail below. Therefore, in order to avoid potential confusion, the Employer furnished the Union with a complete and accurate list of home addresses for each employee eligible to vote. [Tr. 34.] This list of home addresses provided the Union with a single, clear and accurate point of contact for each eligible employee. There are no errors in the list of home addresses furnished by the Employer.

The Union failed to present any evidence that the home addresses provided by the Employer were inaccurate or not employees' actual home addresses. In fact, Union President and Business Agent Mr. Ryan admitted at the hearing that he could have used the list to visit employees at their homes, but that he made no effort to do so. [Tr. 24.] The Union was thus provided with sufficient information to allow officials to contact and communicate with members of the proposed bargaining unit. The fact that the Union made no effort to communicate with employees other than by mailing information to employees just one week prior to the election does not render addresses on the eligibility list "inaccurate and/or incomplete." Accordingly, the Hearing Officer erred in finding that that the Union was "unable

³ Citations to the May 7, 2015 Hearing Transcript hereinafter referred to as "Tr."

⁴ Similarly, the Hearing Officer determined incorrectly that "the Employer's decision to provide just residential addresses ... effectively removed a substantial number of employees from the reach of the Union's campaign appeals." [*Report*, 7.]

to communicate” with employees where it was provided with a complete and accurate list of home addresses for all eligible employees.

2. The Hearing Officer Erred in Concluding that it was Reasonable for the Union to Assume That The Home Addresses Provided by the Employer Would Not Permit Union Officials to Contact Employees at the Their Homes.

The Hearing Officer concluded that, because 18 envelopes were returned as undeliverable by the Postal Service, “it would be reasonable for the Union to assume that those addresses were incorrect.” [*Report*, 7.]. This statement from the Hearing Officer has no basis in fact, and is contrary to the testimony provided by the General Manager as to the source and accuracy of the material contained in the eligibility list. [Tr. 34-36.] The Hearing Officer went one step further and reasoned that “it is not at all clear that the Union would necessarily be able to reach these employees by the alternative means of making a home visit.” [*Report*, 7.] Absolutely no evidence was presented at the hearing to support such a conclusion. The only relevant facts in the record are that the Employer derived the addresses on the eligibility list from each employee’s driver’s license and employment application [Tr. 34.]; and the Union made no attempt to contact any employees by visiting them at the address provided on the list. [Tr. 24.]

Notwithstanding the unsupported conclusions of the Hearing Officer, there is simply no evidence in the record that the home addresses provided by the Employer were incorrect, and the credible testimony of the General Manager clearly indicates that the addresses were correct based upon information given by the employees themselves. Because the Union made no effort to contact employees at their home addresses, it was unable to provide any evidence that the addresses were inaccurate.

Accordingly, it was an error for the Hearing Officer to conclude that it was reasonable for the Union to *assume* that the home addresses provided on the eligibility list were incorrect. That conclusion is not supported by the facts in the record.

3. The Hearing Officer Erred by Failing to Acknowledge and Account for the Complexity of the Mail Delivery System on the Island of Martha's Vineyard.

Underlying this entire dispute is the fact that the mail delivery system on the island of Martha's Vineyard is particularly complex. Notably, Mr. Ryan, having run a campaign on the island in 2003, is well acquainted with this complexity. [Tr. 14-15, 31.]

To illustrate the quirkiness of the mail system, Employer's counsel asked Mr. Ryan on cross-examination whether a particular address was a street or a mailing address. The Hearing Officer interjected in an attempt to aid the witness, stating, "I would say it's hard to know based on --- since I don't know how the addresses work, but it's -- it says #11 A Street, in addition to all these Box Numbers, so I -- ... it would be hard to tell, I think." [Tr. 25.] Thus, the Hearing Officer himself indicated a lack of understanding of the Martha's Vineyard mailing system. In light of this confusion, and relying upon the obvious confusion of the Hearing Officer, the Union put on no evidence regarding the complexity of the Island's postal system. The system has vexed residents and businesses for years. As a result, the Employer does not regularly send employment-related material to employees by mail and does not maintain a list of employees' mailing addresses.

Based on the evidence presented at the hearing, it appears that certain employees receive mail at their home addresses while others apparently do not. [*Petitioner's Hearing Exhibits 2-*

23.]⁵ However, the Union did not establish that the Employer knew or should have known this fact at the time the eligibility list was submitted.

The fact that a number of employee personnel files also contained some type of post office box number is not conclusive evidence that the employee did not or was not able to receive mail at his home address. Indeed, it is possible for an individual to have mail delivered at either or both addresses (as illustrated by the fact that nearly half of the letters sent by the Union were apparently delivered and received by employees at their listed home address).

The Hearing Officer erred by failing to understand the complexity of the island's postal system and improperly concluding that the addresses included in the eligibility list were inaccurate and/or incomplete, when in fact the list was accurate.

4. The Hearing Officer Erred by Finding that the Employer Knew that an Employee's Mail Could Only be Received at an Address Other Than His Listed Residential Address.

The Hearing Officer concluded that "at the time the Employer provided the list to the Union it was aware that some 60% to 70% of the eligible voters used addresses other than their residential address to receive mail." [*Report*, 9.] There is, however, no evidence in the record to support of this finding. While the Employer's General Manager stated that in searching employees' personnel files he estimated that approximately 60-70 percent of employees maintained post office boxes in addition to their home addresses [Tr. 42], there is no evidence in the record that the Employer knew or should have known that those employees were unable to receive mail at their listed home address.

The Employer had no reason to know of these circumstances because: 1) it did not send out campaign material by U.S. Mail using the addresses contained on the eligibility list [Tr. 34];

⁵ Citations to *Petitioner's Hearing Exhibits* hereinafter referred to as "*P. Ex.*"

2) it does not regularly maintain a list of employee mailing addresses [Tr. 34]; and 3) it does not regularly send out employment-related material to employees by mail [Tr. 30-31.]

As discussed above, the Employer does not rely upon the Martha's Vineyard mail delivery system because of the well-known and significant complexities in that system. Thus, the Employer had no way of knowing that any particular employee would be unable to receive mail at their current home address. Moreover, as noted above, there is nothing preventing an individual from receiving mail at both his home address and at a post office box. This is supported by the fact that several letters sent by the Union were apparently delivered to and received by employees.

In determining that the Employer should have included both addresses (home and mailing), the Hearing Officer has essentially re-defined the *Excelsior* list requirement. Under this proposed new requirement, an Employer must provide any and all addresses on record. This is contrary to the Board's well-established rule that Employers need only provide a union with a current home address for all eligible employees. The Employer in this case has certainly complied with that rule by furnishing the Union a complete and accurate list of home addresses of every eligible employee.

Accordingly, the Hearing Officer erred by concluding that the Employer should have known employees with an additional mailing address would not be able to receive mail at their home address.

5. The Hearing Officer Erred by Crediting the Testimony of Union's President Concerning His Actions Prior to the Election and His Access to the Contact Information of Employees Who Had Signed Authorization Cards.

The Hearing Officer found that Charles Ryan, the Union's President, "provided inconsistent testimony with respect to the addresses of ... 6-8 employees who were already listed

in the Union's computer system." [Report, 4 n8.] In support of this conclusion, the Hearing Officer determined that Mr. Ryan initially testified he checked the addresses of the 6-8 employees in question and those addresses matched the address that appeared on the voter eligibility list provided by the Employer. However, on cross-examination, Mr. Ryan provided a different account regarding these addresses, first testifying that the addresses already in the Union's system were P.O. Boxes, but later stating that some of those addresses in the system were street addresses. [Report, 4, n8.] As noted above, Mr. Ryan led an organizing campaign with the same group of employees in 2003 and was thus well acquainted with the complexities and deficiencies of the island's mailing system. [Tr. 14-15, 22, 31.]

Despite Mr. Ryan's clearly contradictory testimony on such a critical issue, the Hearing Officer inexplicably credited the remainder of Mr. Ryan's often questionable and unlikely testimony. For instance, Mr. Ryan, who received the *Excelsior* list from the Employer on February 19th, testified that his March 10th letters to employees was his *first and only* attempt to communicate with members of the proposed bargaining unit. [Tr. 22.] Astonishingly, this testimony was credited by the Hearing Officer. [Report, 5.] In this same vein, Mr. Ryan, a long-time union organizer with years of experience (including experience on the island of Martha's Vineyard), claimed that he did not maintain a copy of the approximately 25 authorization cards that he had received from eligible voters [Tr. 20], and did not enter the addresses contained on said authorization cards into the Union's computer system before submitting the cards to the Regional Director in support of its February 2015 Representation Petition [Tr. 20.] Taken as a whole, particularly in light of his blatantly contradictory testimony regarding the information of the 6-8 employees on its system, the likelihood that Mr. Ryan provided untruthful testimony on these related issues is significant, and certainly suggests that Mr. Ryan's testimony should be

viewed with caution. Accordingly, the Hearing Officer erred by crediting the vast majority of his testimony on issues of material fact.

6. The Hearing Officer Erred by Concluding that the Union Did Not Become Aware that there were Address Inaccuracies in the Voter Eligibility List Until After the Election.

The Hearing Officer concluded that the Union did not become aware of what it considered address “inaccuracies” until after the March 18th election when the Postal Service returned several envelopes addressed to employees. [*Report*, 8.] While the Employer contends that the list of employee address was accurate and complete, to the extent that the Union contends that those addresses were either incomplete or inaccurate, it is highly improbable that the Union did not learn of these issues until *after* the election. As an initial matter, Mr. Ryan testified that information for 6-8 names on the *Excelsior* list were already inputted into his computer as a result of the Union’s 2003 campaign. Presumably, the addresses on its system were different from what had been provided by the Employer. [Tr. 21.] Mr. Ryan testified unpersuasively that he undertook no efforts to (and was unable to) check the information on the *Excelsior* list against the addresses that had been provided on the 25 authorization cards. [Tr. 20.] His credibility is thus significantly diminished, and his testimony should not have been relied upon by the Hearing Officer.

Based on Mr. Ryan’s well-documented inconsistent statements, it is more likely than not that he also provided false testimony regarding his knowledge of alleged “issues” with the addresses on the *Excelsior* list. Accordingly, the Hearing Officer erred by crediting Mr. Ryan’s testimony that he did not become aware of the alleged address inaccuracies until after the election.

7. The Hearing Officer Erred by Concluding that the Union Did Not Have an Obligation to Advise the Employer or the Board of Suspected Address Inaccuracies.

The Hearing Officer concluded that the Union had no obligation to bring the alleged inaccuracies on the *Excelsior* List to the Employer's attention because the Employer was aware of the inaccuracies and failed to bring them to the attention of the Union. [*Report*, 9.] As discussed in detail above, the strong weight of the evidence presented at the hearing established that the Union had knowledge of the alleged inaccuracies well before it sent out the letters on March 10th. Despite having knowledge of the potential discrepancies (based on information in its system and information contained on employees' authorization cards), the Union nonetheless sent the mailings, knowing, based upon the information available to it, that some of the letters would likely be undeliverable, as many of the employees had presumably provided a preferred mailing address that was different from the information on the *Excelsior* list. This is clear evidence that the Union only made the mailings, at such a late stage, for the sole purpose of setting up a basis for objections in the event that they were not satisfied with the election results. The fault in this regard lies clearly with the Union, and the Union should not be permitted to benefit from its own bad faith attempts to take advantage of the Employer's good faith efforts to comply with the *Excelsior* list requirement.

The Employer is unaware of any decisions in which the Board has set aside an election where the evidence showed that the petitioner knew or should have known about perceived deficiencies in a list's addresses well before the election but failed or refused to seek a corrected version of those addresses. On the other hand, the Board has routinely emphasized an employer's failure or refusal to provide an updated or corrected list of addresses (upon request) as grounds for setting aside an election. *See, e.g., Medtrans*, 326 NLRB 925 (1998); *Rite-Care Poultry Co., Inc.*, 185 NLRB 41 (1970); *Rite-Care Poultry Co., Inc.*, 185 NLRB 41 (1970)

(“where ... it has been brought to the Board agent’s attention that the *Excelsior* list contains a number of incorrect addresses, and the Board agent makes a specific request of the Employer that the list be updated with any new corrected addresses now in the possession of the Employer, such request should be honored”); *Laidlaw Medical Transportation*, 326 NLRB 925 (1998); *In Re Medic One, Inc.*, 331 NLRB 464 (2000). In the instant case, there is no evidence of a failure or refusal of the Employer to provide an updated or corrected list of addresses as no request for such an updated or corrected list was ever made by the Union.

In support of his determination that the Union was under no obligation to bring these issues to the Employer’s attention, the Hearing Officer cites to *Merchant’s Transfer Co.*, 330 NLRB 1165 (2000). However, that reliance is misplaced. In that case, the Board held that a union’s failure to alert an employer about a problem with the information on the *Excelsior* list is immaterial when the Employer knows that the list is deficient. Here, however, there is no evidence in the record that the Employer knew or should have known about the suspected deficiencies. Accordingly, the Hearing Officer erred by concluding that the Union had no duty to bring these issues to the Employer’s attention once it knew or should have known about what it claims to be address inaccuracies.

8. The Hearing Officer Erred by Improperly Applying Controlling Board Precedent to the Facts in Recommending that the Union’s Objection be Sustained.

The Hearing Officer further erred in applying Board precedent to the facts of this case. Specifically, the Hearing Officer placed an overstated reliance upon the Board’s decision in *Rite-Care Poultry Co., Inc.*, 185 NLRB 41 (1970). There, the Board set aside an election where the employer *refused* to provide corrected addresses in response to a timely and specific request by the union. The list supplied by the employer gave only the initials of forenames of employees. Moreover, it provided *only* the name of the town or city where the employees lived and, in some

instances, a route number. Omitted from the addresses were street addresses and/or post office box numbers.⁶ The Board determined that the Employer maintained employees' correct addresses in its files and in fact utilized this information in making its own mailings of campaign propaganda to the same employees. Shortly after it received the incomplete list the union wrote a letter to the Regional Director complaining that the list did not contain "correct" names and that the addresses were "incomplete" but indicated it wished to proceed with the scheduled election, reserving its right to file objections based on the list. The Regional Director advised the employer of the petitioner's complaint concerning the list. The employer made no response. Following a vote against the petition, the Board set aside the election results based on the employer's failure to provide a corrected and complete version of the list once notified.

The operative facts of the present case are readily distinguishable from those in *Rite-Care Poultry*. Notably, these material distinctions were paid short-shrift by the Hearing Officer. While the Hearing Officer emphasized the fact that the Board in *Rite-Care Poultry* mentioned the absence of street address and "post office box numbers", the Board's decision to set aside the election there was based on a host of failures committed by the employer, and not simply the technical issue surrounding the inclusion of certain employees' post office box numbers. Moreover, unlike the present case, the employer in *Rite-Care Poultry* provided the union with an entirely different list of addresses than it used to mail its own campaign material. That list

⁶ The Hearing Officer emphasized the fact that the employer did not provided street address or *post office box numbers*, but failed to consider the fact that the information provided by the employer in *Rite-Care* was a far cry from what was provided by the Employer here. To illustrate the difference, here is an example of the type of information provided by the employer in *Rite-Care*:

T. Smith
Boston, MA

In contrast, the Employer here provided the following information:

Tom Smith
123 Main Street
Boston, MA 02110

contained only the employee's first initial and last name, accompanied by nothing more than the city or town in which they live. No street addressees were provided. Here, by contrast, the Employer provided full names and complete home addresses for all eligible employees. Unlike the employer in *Rite-Care Poultry*, Mr. Morris testified credibly that the Employer did not send campaign material to employees by mail, primarily because it rarely if ever used mail to communicate with its employees [Tr. 35.] This establishes that the Employer had no reason to know that the addresses provided would not allow the Union to deliver campaign material by mail to certain employees on the *Excelsior* List.

The Hearing Officer also failed to address the *Rite-Care Poultry* Board's determination that address inaccuracy "seriously impairs the ability of labor organizations to locate employees at the *home addresses* for the purpose of making *face-to-face campaign appeals*." (Emphases added.) The Board further explained in that case that "under *Excelsior*, it was contemplated that the addresses should be adequate to enable labor organizations to use the list to make such personal appeals to employees *at their homes*." *Id.* at 42, n9 (emphases added). The Employer in the instant case clearly met this requirement when it provided addresses that allowed the Union to contact employees at their homes.

Additionally, *Rite-Care Poultry* is distinguishable on the grounds that the union in that case notified the employer of the alleged discrepancies in addresses once it had reason to believe the list contained discrepancies. Here, in contrast, the Union had access to the addresses of approximately 25 employees who had provided signed authorization cards and another 6-8 employees whose addresses had been retained from the Union's 2003 campaign. Despite possession of this crucial information, which would have allowed the Union to notice any discrepancies between the addresses on the *Excelsior* list and the employees' preferred address,

the Union made no attempt to contact the Employer in an effort to request a clarification or an updated list. Accordingly, the Hearing Officer erred by improperly relying upon *Rite-Care Poultry*.

9. The Board Should Reconsider the Holding of *Thrifty Auto Parts*.

The Employer respectfully submits that the Board should reconsider its holding in *Thrifty Auto Parts*, 295 NLRB 1118 (1989), in which the Board held that whether address inaccuracies were the result of bad faith or mere inadvertence does not influence the calculation of whether compliance with the requirement has been substantial. An employer should not be penalized in a situation, like here, where the evidence shows that it acted in good faith throughout the pre-election period and made reasonable efforts to comply with the *Excelsior* requirement.

10. The Hearing Officer Erred in Recommending that a New Election be Conducted in this Matter.

Based on his finding that the Employer failed to provide accurate and complete addresses of eligible employees, the Hearing Officer has recommended that the results of the March 18th election be set aside, and that a new election be conducted. For the reasons stated above, this recommendation is not supported by the facts in the record. The Employer provided an accurate and complete eligibility list and so met all of the requirements necessary to allow the Union to communicate with the employees. The conclusions of the Hearing Officer to the contrary are based upon conjecture and unreasonable reliance upon questionable testimony of the Union President.

III. CONCLUSION

For the reasons set forth above, the Employer respectfully requests that the Board grant its Exceptions to the Hearing Officer's Report and Recommendation on Objection, and issue an order certifying the results of the March 18, 2015 election.

Respectfully submitted,

TRANSIT CONNECTION, INC.

By its attorneys

/s/ Mark R. Reich

Mark R. Reich

Massachusetts State Bar #553212)

Timothy D. Zessin

(Massachusetts State Bar #677612)

KOPELMAN AND PAIGE, P.C.

101 Arch Street, 12th Floor

Boston, MA 02110

(617) 556-0007

tzessin@k-plaw.com

Dated: June 17, 2015

CERTIFICATE OF SERVICE

I, Timothy D. Zessin, hereby certify that on June 17, 2015, I caused the foregoing Employer's Brief in Support of Exceptions to Hearing Officer's Report and Recommendation on Objection to be filed with the Executive Secretary, National Labor Relations Board, using the NLRB E-filing system. I further certify that I caused a copy to be served via electronic mail and first-class mail upon the following individuals:

Jonathan B. Kreisberg
Regional Director
National Labor Relations Board, Region 1
10 Causeway Street, Sixth Floor
Boston, MA 02222-1001
jonathan.kreisberg@nrlb.gov
Region1@nrlb.gov

Gene Switzer, Hearing Officer
National Labor Relations Board, Region 1
10 Causeway Street, Sixth Floor
Boston, MA 02222-1001
gene.switzer@nrlb.gov

Charles Ryan
Amalgamated Transit Union, Local 1548, AFL-CIO
PO Box 1230
Plymouth, MA 02362-1230
atulocal1548@yahoo.com

/s/ Timothy D. Zessin
Mark R. Reich
Massachusetts State Bar #553212)
Timothy D. Zessin
(Massachusetts BBO #677612)
KOPELMAN AND PAIGE, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110
(617) 556-0007
tzessin@k-plaw.com

Dated: June 17, 2015